No. 14787

In the
United States Court of Appeals
For the Ninth Circuit

RICHARD WAYNE FRANK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of four years on Count One, with a probationary proviso, and imposition of sentence on Count Two was suspended. [R 10-12]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 13]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

The indictment charged appellant with two violations of the Universal Military Training and Service Act. [R 3-5] It was alleged that he became a registrant of Local Board No. 31 of the Selective Service System in the County of Contra Costa, State of California and that having theretofore been duly classified in Class I-0, did [in Count One] knowingly refuse and fail to comply with the order of his said Local Board No. 31 to accept employment doing civilian work contributing to the maintenance of the national health, safety and interest at the Los Angeles County Department of Charities, on February 23, 1954 and [in Count Two] did knowingly refuse and fail to comply with the order of his Local Board No. 31 to accept the same employment on June 18, 1954. [R 4]

Appellant pleaded not guilty, waived jury trial and was tried on March 2, 1954. [R 16-] A written motion for judgment of acquitted was filed. [R 7-] The motion was denied and the appellant was found guilty on March 3 and sentenced on March 3. [R 10-12] The motion contains all of the grounds that the appellant relies upon for reversal of the judgment in this case. [R 42-]

THE FACTS

Appellant registered with Local Board No. 31 on September 16, 1948 [Ex 1-2]* He answered the question "7. Occupation" by the word "Minister," and the question "8. Firm or individual by whom employed" by the expression "Jehovah Witnesses." He filed his eight-page Classification Questionnaire on October 21, 1948. [Ex 4-] In it he showed he was a minister of religion [Ex 6, Series V, 1(a)]; that he regularly served as a minister; that he had been a minister since July 28, 1940, having been ordained on that date. He stated he did secular work only when he needed funds and did not have any regular secular work. [Ex 8] He signed Series XIV (conscientious objector declaration) [Ex 11]. He explicitly claimed the IV-D (minister's) classification [Ex 11]. He filed the completed Special Form for Conscientious Objectors [Ex 29-] and tried to make clear in it that his conscientious objections to war were based on and were the product of this dedication to his ministry.

At the same time he presented considerable documentary material to establish his claim to the IV-D minister's classification:

Ex 16, that he was an official of the Pittsburg, California Company of Jehovah's witnesses;

Ex 17-18, his biography as a minister;

Ex 19-20, his appointment as a Pioneer, [full-time minister] dated November 1, 1947;

*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

Ex 21, his superior's endorsement of his work;
Ex 22, corroborating affidavits from friends.

Nevertheless, the local board classified him as a conscientious objector, Class IV-E, on September 20, 1949. [Ex 12] At that time the classification entailed no obligation that interfered with his ministry, so he interposed no objection to it. He was then as free to follow his ministry as if he had been given the IV-D (minister's) classification. In the fall of 1951 the regulations were changed: The classification name of IV-E was changed to I-0 and also, I-0 entailed an obligation of twenty-four consecutive months of work as ordered by the local board.

The local board, conforming to the new law, placed appellant in Class I-0 on November 19, 1951 and mailed him a notification on November 20, 1951. [Ex 12] On December 7, 1951 appellant appeared in person at the office of the local board bearing an explanatory and argumentative letter, dated December 6, 1951 and then and there filed by him. [Ex 36] He also explained to the clerk of the local board why he was late in responding to the November 20th notice and why he wanted a personal appearance before the board and an appeal: He stated to her that his mail from the local board was being missent, to wit, his address was Clayton Road, Concord and the board was addressing his mail to Clayton Road, Clayton. [R 10-20] It is to be noted that the local board for some time thereafter, nevertheless, sent his mail indiscriminately to one or the other address. See Ex 42 and succeeding pages. In

fact, on March 23, 1953 it sent him mail addressed to both addresses: See Ex 65, 76. At this time (March 23, 1953) he again informed the board of his correct address [Ex 79] and thereafter his mail was correctly addressed.

When appellant visited the local board office on December 7 he also presented some more documentary evidence of his ministry. [Ex 37-38] He subsequently presented still more such evidence [Ex 40, 41] but his classification was never reopened or even reviewed.

The local board did not thereafter give him a personal hearing nor did it send his file to the appeal board. [Ex 12, R 19-20] He has never had an appellate determination [Ex 12] nor has he ever had a personal appearance before the local board, within the definition of the law. [He was called in on April 6, 1953, for the limited purpose of an "arbitration" concerning a type of civilian work. Ex 81-83]

Appellant testified the local board did not post the names and addresses of Advisors to Registrants. [R 17, 27] No selective service officials, or anyone else, testified on this subject.

During the entire processing period the board had no evidence that refuted, in any manner, or to any degree, his claim for a IV-D classification. He had initially shown he was a full-time minister (Pioneer) in his religious society [R 21, 23; Ex 1, 7, 8] doing secular work, for relatives, only when he needed some cash; on December 17, 1951 he indicated on a Selective Service System form that his secular employment, since

December 1, 1949 had been as a milkman for "Golden State Dairy Products;" [Ex 39]; even long after his last classification, on July 8, 1952 the file shows that the local board itself considered that he was "unemployed except when necessary or convenient; then only for relatives, holds no full or part-time job." [Ex 44]

Despite of his new evidence, he was neither given the IV-D classification, nor was his classification reopened, nor even was his new evidence considered and rejected (in writing, as required, or at all), but he was sent an "Application of Volunteer for Civilian Work" [Ex 63] on October 23, 1952. To a follow-up request from the local board he replied that his obligations to his family (he had become married) and to his local congregation were such that he could not abandon them lightly. [Ex 73] Subsequent "arbitration" and correspondence with the local board shows that his problem was two-fold: Supporting his family [Ex 109] and keeping his consecration to his ministry, that is, the job must allow time for his ministry work at its effective hours. [Ex 116] When he was ordered to report at the Los Angeles Department of Charities on February 24, 1954 [Ex 130] he did so but refused to accept the work offered when he learned that the hours would prohibit his effective preaching work. [Ex 134] The General Counsel of the Selective Service System (Col. Daniel O. Omer) refused to recommend prosecution because he considered it was error for the board to have ordered appellant to report directly to Los Angeles. [Ex 103] Consequently a new order was given appellant, to report to his local board office for in-

structions for work, on June 11, 1954. [Ex 150] A duplicate of this order was sent the prospective employer who returned it with the notation that appellant had refused the work offered because of the work hours involved. [Ex 152] The appellant's version is similar. [Ex 161]

Prosecution followed. [R 3-5]

QUESTIONS PRESENTED AND HOW RAISED

I.

In December, 1951 appellant requested a personal appearance before the local board so he could protest the denial to him of a IV-D, minister's classification. The clear import of the written request [Ex 36] was that the registrant was appealing for a review. He He testified that he understood asking for the appearance was the first step in the appellate process. [R 19]

When appellant presented the written request, several days "late" he explained to the clerk [R 19-20] why his written request was late. His testimony on this subject was not contradicted or rebutted in any manner, nor during his cross-examination was his explanation in any manner questioned.

The question presented here is whether his excuse for the tardy written request is legally sufficient so that the facts that he never had a personal appearance hearing or an appeal become denials of due process.

The question was raised by motion for judgment of acquittal. [R 7-10] All the following questions were raised in the same manner.

II.

During the period (and at all times before) when appellant attempted to secure a review of the denial of his IV-D claim, it is undisputed that his local board never posted the names and addresses of Advisors to Registrants.

Appellant therefore had no means of learning that he could also request the State Director of Selective Service and the Director of Selective Service to perfect an appeal for him.

The question presented here is whether the failure to post the names and addresses of Advisors to Registrants is in itself a denial of due process. Also involved here is whether it need be shown that the registrant has been prejudiced by such a failure to post, and further, if this is so was this appellant prejudiced?

III.

Appellant was last classified on November 19, 1951. On December 7, 1951 he presented some new evidence of his ministry; he presented more previously unconsidered evidence, up to at least February 15, 1952.

The local board did not reopen his classification upon receipt of this evidence; the local board never sent him the notice, required by §1624.4 of the regu-

lations informing him a decision not to reopen had been made.

The question presented here is whether the failure to reopen his classification was a denial of due process. Also involved here is whether the failure to conform to the regulation requiring that his evidence be considered and that a decision to refuse to reopen is to be followed by a notice to registrant, are also denials of due process.

IV.

Appellant was indicted and convicted and sentenced on each of two counts.

Each count was for a refusal to accept work as ordered, at the Los Angeles Department of Charities, the date of each order being different. Appellant argues that the evidence shows conclusively that the second order was intended solely as a substitute for the first.

The question presented here is whether the issuance of the second order was a waiver of the refusal to obey the first.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

I.

Appellant was improperly denied an administration hearing and/or an administrative appeal.

The file shows that appellant, from the very first, claimed that he was a minister and within the selective service definition.

The trial court's statement that he would consider appellant a minister, on the evidence in the Selective Service file [Supp. Trans. of R. p. 2] *is a finding* that there was no basis in fact for the local board to have denied its registrant the IV-D classification. *Dickinson vs. United States,* 74 S. Ct. 152.

He had presented a *prima facie* case that ministry was his vocation. He was not given the IV-D classification although his undisputed evidence up to and even long after his last reclassification was that he did secular work only spasmodically and then but for a few hours a week.

Nevertheless, and despite of the trial court's finding and the *prima facie* condition of his file it is not appellant's argument that this case presents a no-basis-in-fact situation under the *Dickinson* rule. It is appellant's sole argument here that he should have had an administrative appellate determination.

In December 1951 when he presented a written appeal for review a few days after the ten-day period expired, his reason for the tardiness was ignored. His reason was that the local board had missent his Notice of Classification. This reason is a reasonable one and has been recognized as such by the courts. *In re Abramson,* 196 F. 2d 261.

II.

Appellant was deprived of the Advisor to Registrants and was prejudiced.

Appellant testified his local board did not post the names and addresses of Advisors to Registrants on the office bulletin board. [R 17] Appellee placed no witnesses on the stand to rebut this testimony; it is therefore hardly disputable but that this is a fact. *United States vs. Di Re,* 332 U. S. 581 (1948). Moreover, in every case that has come to this Court involving this point, it is clear that the California boards did not post such information. See the trial judge's comment on *Uffelman,* No. 14780 [Uffelman, R 23, 45]; also see *Chernekoff vs. United States,* 219 F. 2d 721, 722, 724.

The law requires the posting [§1604.41 of 32 C.F.R.] and this Court has declared that failure to post pre-

sents a problem of due process, *Chernekoff,* supra, page 724. Also, it is so serious a departure that an administrative appeal doesn't cure the defect. *Ibid* and *Franks vs. United States,* 9 Cir., 1954, 216 F. 2d 266.

Moreover, this appellant was grievously wronged by the failure to post because he knew of no place to turn for aid when his tardy December 6, 1951 request for a review was ignored. The Advisor's duty would have been to inform him that both the Director and the State Director had authority to help him and that they did frequently intervene in behalf of registrants whose local boards either misunderstood the law or who abused their discretion.

III.

Appellant was denied due process when the local board refused to either reopen his classification or to consider reopening it.

On November 19, 1951 appellant was classified for the last time. On December 7, 1951 and up to at least February 15, 1952, he submitted new and further evidence of his ministry, evidence not previously considered, and, if true, [that the ministry was his vocation] of a nature that required his reclassification. Not only did the board fail to reopen his classification, but it failed to consider it and to send him such notice, as required by §1625.4 of the regulations. Such two failures are independently denials of a due process and the courts have so held.

United States vs. Clark, W.D.Pa., 1952, 105 F. Supp. 613;

United States vs. Crawford, N.D.Calif., 1954, 119 F. Supp. 729;

United States vs. Nimori, No. 33680, N.D.Calif. S.D. (Sept. 25, 1953);

United States vs. Nichols, No. 22951-HW, S.D. Cal. C.D. (Dec. 14, 1953);

Berman vs. Craig, 3rd Cir., 207 F. 2d 888;

Hull vs. Stalter, 1945, 151 F. 2d 633;

United States vs. Lacasse, No. 23222-PH, S.D. Calif. C.D. (Jan. 13, 1954).

IV.

The Government did not sustain its burden of proof in connection with Count One of the indictment.

The delinquency of appellant (if any) in connection with the first order to report was waived by the issuance of the second order. The evidence shows that the second order was solely intended, and actually was, only a substitute for the second.

ARGUMENT

I.

APPELLANT WAS UNFAIRLY DENIED AN APPEARANCE BEFORE LOCAL BOARD AND/OR AN ADMINISTRATIVE REVIEW.

Appellant's file shows that he had presented a considerable amount of evidence that he was a minister and that the ministry was his vocation. He did this from the very first. He did this at every opportunity. If this Court agrees that he had presented a *prima facie* case for a minister's classification then it requires no argument that no basis in fact existed for the conscientious objector classification, for the latter is a "higher" classification than the former and the regulations require the board to place the registrant in the "lowest" classification that his evidence justifies. [32 C.F.R. §1623.2]

Significant, and perhaps ordinarily dispositive of the problem is the trial court's statement that he would consider appellant a minister, on the evidence in the Selective Service file [Supp. Trans. of R. p. 2]. This is really *a finding* that there was no basis in fact for the local board to have denied its registrant the IV-D classification. The verdict of guilty is, therefore, contrary to the trial Court's finding.

Dickinson vs. United States, 74 S. Ct. 152.

However, it is not appellant's argument that he presents a no-basis-in-fact case under the *Dickinson* rule.

Appellant does not ask the Court to hold he is within *Dickinson*. Appellant argues *only* that he should have been given an administrative appeal to determine his status.

When the local board gave him only the conscientious objector's classification he was entitled to an administrative appeal if he conformed in every substantial respect to the prescribed method of perfecting an appeal. The problem presented in this case is the tardiness of his request. The Notice was mailed to appellant on November 20th; he responded on December 7th.

As appellant testified, the postcard Notice of Classification also has printed on it information concerning his right to appeal and that the first step was to ask the local board for a rehearing, termed a personal appearance before local board. [R 19]

Appellant, on December 7, 1951, personally presented a written request for the review and made an explanation to the clerk for his tardiness, namely, that his mail was missent. [R 20] His request was ignored by the board and the record shows he never has had a personal appearance nor an administrative appeal. The "interview" that he did have with the board *in 1953* was not at his request and was for the sole purpose of persuading him to abide by the work rules of the Selective Service System. This interview afforded him no opportunity to present reclassification evidence or to take an appeal. In passing, it is to be noted that his change of status from that of "pioneer" [substan-

tially full-time minister] in 1951-1952, to that of the "publisher" [one who devotes to his ministry all the time he can spare from secular work] in 1953, in no way weakens his defenses in this case because his last classification was made during the period when he was a pioneer. If the board, at this 1953 interview, had "reopened" his classification and *then reclassified* him again in Class I-0, his rights to a genuine personal appearance and to an administrative appeal would obviously have been unproductive to him because of his 1953 status change. The board would have been guiltless; here it is not.

Here we are confronted with a denial of right that occurred at a time, December 1951, when his status was undisputable. He was then a pioneer, a "full-time" minister as well as being a minister by vocation. The climate of December, 1951 and the lack of high court clarification until November 1953 [*Dickinson vs. United States,* 74 S. Ct. 152] explains, but does not justify the refusal of the local board to give him a IV-D classification. Today, the pioneer Jehovah's witness less frequently encounters such a failure on the part of a board to face facts as is presented by his file.

This Court's approach to a determination of whether there was denial of due process must be made according to the status when appellant requested a reopening of his classification.

Hull vs. Stalter, 7th Cir., 1945, 151 F. 2d 633.

However, the principle problems to be considered on the question of the claimed denial of due process

[no hearing or appeal] lie in a different area. Appellant's tardy letter presents certain questions:

1. Did the board have authority to waive the ten-day rule? The answer is found in subsection (d) of Section 1626.2:

   "(d) At any time prior to the date the local board mails to the registrant an Order to Report for Induction (SSS Form No. 252), the local board may permit any person described in paragraph (c) of this section to appeal even though the period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board there after permits an appeal, the right of such persons to appeal shall expire at the end of the period provided for in paragraph (c) of this section. If an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Classification Questionnaire (SSS Form No. 100) under the heading 'Minutes of Actions by Local Board and Appeal Board.' "

2. Was the board arbitrary in refusing relief to appellant?

   Regardless of how strict a board may be in scrutinizing its registrant's evidence for a deferred or exempt classification, there is no justification for strictly construing his appellate rights. This is particularly so when the claim is made that the delay was caused by some fault of the Selective Service System. Here, the registrant complained

his mail was coming late. [R 19-20; also see Ex 42 and succeeding pages, particularly 65 and 76 for the continuing confusion of address] Under like circumstances it has been held that the registrant's tardiness was excusable. The Third Circuit decided that where substantial error appears in the mailing address, the communications should not be considered as mailed to the addressee at least until the time of delivery. *In re Abramson,* 196 F. 2d 261, 264. Appellant submits that the situations are comparable. Appellant repaired to the local board office, bearing his written request, within ten days of the delivery of the notice. [R 19-20]

A situation was presented two years ago in a district court where the registrant tardily received a notice of the date set for a hearing and he then asked for resetting. Chief Judge Leon Yankwich expressed himself both on this subject of notice tardiness and on the importance of granting a registrant his procedural opportunities. as follows:

"THE COURT: All right, gentlemen, call Jack Howard Waterfield. Do you gentlemen desire to add anything to the argument you made about two weeks ago in this matter?

. . .

THE COURT: Gentlemen, I think this man was not given due process. I do not believe, when a man makes a request, that a Board can send a letter and then, when notified by the defendant's mother that he is away temporarily, just say 'We won't give you another date.'

Obviously, the law does not require the man to hold himself at military attention and salute the moment he asks for a personal interview. He has a right to be treated as reasonable human beings are. This man asked for a personal interview. The letter from the Board reached his home while he was out of town. It is not required for a man, when he has been classified by a Board, to remain in town at the Board's beck and call. The Board should be reasonable about it.

In this particular case, supposing the man's mother had not lived there, and the letter had reached his home while he was gone? You couldn't put him in default when the man hasn't received the letter. As a matter of fact, in law we allow three days extra on service by mail, on the presumption it might be delayed; but this man's mother opened the letter, and she called up, and the Secretary of the Board wrote down 'The mother says he is out of town.' Then when he came back, he went down immediately, and they said, 'It is too bad, you are too late.' In the meantime, they had written, 'Request for another hearing, oral, denied. The registrant did not appear.'

They knew why he didn't appear. That is not a frank statement. In typewriting, on page 35 of the record, appears:

'Jack Howard Waterfield, 4-79-31-58
November 3, 1952
Jack Howard Waterfield's mother called and said that he is out of town and would not be in today. Would like another appointment for next Monday.

I told her I would put it up before the local board.'

In spite of that, she writes below:

'Registrant did not appear 11/3/52.'

He wasn't there; he hadn't received the notice. He had been out of town.

'Request for another appearance denied.'

So they denied it arbitrarily, depriving him of the right of appeal, and that is not due process.

I find the defendant not guilty, as the only method of correcting an injustice. This man was entitled to a personal appearance, and he did not get it, and they had no right to say he had to stay around. That is not due process, as I understand, so the man is found not guilty.

MR. TIETZ: Bond exonerated, your Honor?

THE COURT: Bond exonerated."

United States vs. Waterfield, S.D.Calif. No. 3143-N.D. May 15, 1953.

Another somewhat similar situation arose even more recently before the late Judge Campbell E. Beaumont. The defendant complained that he received his mail too late. He was an oil field roustabout and mail was often delay in the forwarding:

"MR. KWAN: In this case, your Honor, he has been given the full requirements of the Selective Service System in so far as appearance before the draft board.

MR. TIETZ: We dispute that. He asked for a personal appearance, and he didn't get his mail,

and he begged for another chance. 'Give me another date', he said.

THE COURT: I am interested in that phase, Mr. Tietz. What was the testimony in regard to his asking for another chance here?

MR. TIETZ: It is written, your Honor; it is in the file. I will be able to turn to it in a moment, I think. Page 32. Page 36 is their denial.

THE COURT: Page 32, is it? Well, read it.

MR. TIETZ: 'Local Board No. 70, Fresno County, 472 Palm Avenue, Fresno, California. Gentlemen:

> 'I was granted a personal appearance before your board on February 12. However, I did not receive the notice of the appearance until February 16, so could not be there. I will be glad to come if you will grant me another hearing.
>
> 'Please change my address to 305 E. Bunny Avenue, Santa Maria so that I will receive my mail on time.
>
> 'Leeman Williams.'

Then following are some envelopes to bear it out. And then on page 36 we have a copy, carbon copy apparently, of a letter sent to Leeman Williams, General Delivery, Santa Maria, California:

> 'Dear Sir: Referring to your undated letter regarding your request for personal appearance, this is to advise that you were granted an appearance before this Board within the 10 days allowed and you failed to appear. This 10-day period may not be extended. (SSS Reg. 1624-1(a). Your file has been forwarded to the Appeal Board for action.'

. . .

"The COURT: Well, let the young man come forward, and be sworn. He has been sworn already. Take the stand.

LEEMAN ROY WILLIAMS,

Having been previously duly sworn, was examined and testified as follows:

THE COURT: You may question him.

DIRECT EXAMINATION

BY MR. TIETZ:

Q. I am going to ask you to look at Government's Exhibit page 1, page 31, and briefly identify it.

A. Is that the—

Q. What is it?

A. This is when I was granted my personal appearance before the local board.

Q. When did you get the letter?

A. Well, I don't remember the date.

Q. Turn over to the next page or two and see the postmarked envelopes, and see if that refreshes your memory.

A. Oh, yes, I remember now. This is when I got it, February 16th. In other words, I went in daily to the post office because I was expecting a personal appearance, and I didn't receive the notice until the 16th.

Q. And were there other occasions when mail from your local board to you at this address had been delay more than a day or two?

A. Yes, but I don't remember, I don't recall just exactly where it is in the file.

Q. Do you recall the kind of mail it was?

A. No, I don't.

MR. TIETZ: That is it, your Honor, as I recalled the testimony that he tried to get it each day, knowing that such a letter would come, and it did not come until the 16th.

THE COURT: Have you any questions?

CROSS EXAMINATION

BY MR. KWAN:

Q. Did you make daily trips to the post office?

A. Yes.

Q. Is that from your memory? Is that as best you can remember or to your knowledge?

A. That is according to my memory and the best of my knowledge.

Q. Could you have missed going to the post office—

A. No.

Q. —during that period and asking general delivery for your mail?

A. No.

THE COURT: Are you sure you went to the post office every day before the 16th?

THE WITNESS: Before the 16th? From the 8th to the 16th, yes.

THE COURT: Mr. Tietz, is there any specific time that must be given in regard to this matter? Now, on your request for personal appearance 'an appointment has been made for you to appear on February 12th.' That was dated February 8th. That is only four days.

MR. TIETZ: No. There is no time. I even know of instances of them calling up and saying 'come on down right away, there is a board member here and he can hear you.' And I have never found any reason or occasion to object. Also on the other hand, hearings sometimes go over for months.

THE COURT: Well, I think the Court must accept this young man's testimony in regard to the matter, and I think he should have been given the personal appearance, the extension of the personal appearance.

What were you going to say?

MR. KWAN: Your Honor, I might submit to the Court the fact that once he has been classified by the local board and after he has been classified by the appeal board, the classification by the appeal board supersedes the entire proceedings, and if there were any error in the local board's classification it has been cured by the action of the appeal board.

MR. TIETZ: A novel interpretation.

THE COURT: The court will find the defendant not guilty. The bond is ordered exonerated.

MR. TIETZ: Thank you."

United States vs. Williams, S.D.Calif. No. 3230 N.D., Sept. 20, 1954.

The testimony of appellant Frank contains the clear inference that he came to the local board office with his letter to it dated December 6, 1951, within ten days from his receipt of the Notice of Classification

dated November 20, 1951. [R 20] His testimony was in no manner rebutted nor was he even cross-examined on this subject. The failure to call the local board clerk to contradict his testimony gives rise to the presumption that his evidence is undisputable.

United States vs. Di Re, 332 U. S. 581 (1948).

Furthermore, this Court early recognized that registrants are not to be treated as are lawyers engaged in formal litigation. *Cox vs. Wedemeyer,* 192 F. 2d 920, 923.* Lawyers must carefully observe jurisdictional deadlines in filing appeals. It is not consistent with either the spirit or the letter of the Selective Service law to require such exactitude of registrants. The law permitted the board to accept its registrant's excuse and give him an appeal. It was unfair and arbitrary to cut him off from an appellate determination. His claim was not frivolous. His consecration to his ministry was most serious to him. That he subsequently altered the ratio of secular and ministerial time is neither material to the issues here nor in any way a reflection on his sincerity. It follows the normal pattern of Jehovah's witnesses, namely, a fluctuation resulting from altered financial circumstances. These missionary ministers engage in "pioneering" whenever possible. To some it is never possible. For others (like appellant) it is intermittant and the intermittant pattern is always consistent with family need. The pattern has no relationship whatsoever to draft laws. That

*Talcott vs. Read, 9th Cir., 217 F. 2d 310; *Hufford vs. United States,* 103 F. Supp. 859, 862; *Berman vs. Craig,* 107 F. Supp. 529, 531 (Aff. by 3 Cir., 207 F. 2d 888); *Ex parte Fabiani,* 105 F. Supp. 193, 149.

it may present an in again, out again, gone again Finnegan bookkeeping problem to draft boards is beside the point. The law recognizes that draft status is subject to change. "1625.1 Classification not Permanent.—(a) No classification is permanent." [32 C.F.R. §1625.1]

If a local board is determined not to recognize the ministry of its registrant, it at least should permit him an appellate determination of his claim and evidence. Since this was denied appellant, the judgment of conviction is based on an order to report that is void because of this denial of due process.

II.

APPELLANT WAS DEPRIVED OF THE ADVISOR TO REGISTRANTS AND WAS PREJUDICED

It is indisputable that appellant's local board did not post the names and addresses of Advisors to Registrants. Appellant testified he was frequently in the local board office during his selective service processing, looked at the Bulletin Board and never saw such a posting. [R 17] On cross-examination he was definite that if such a posting had been present he would have seen it. [R 27] No board members or other officials were placed on the stand to in any manner contradict this. Under *United States vs. Di Re,* 332 U. S. 581 (1948) it is therefore a fact.

Moreover, this Court's records indicate, from every one of the cases before it involving this point, that the California boards have never had Advisors to Regis-

trants for many years. See *Uffelman vs. United States,* No. 14780:

"Cross Examination

"MR. FOSTER: Q. You remember everything that was on that board from the first time you registered?

THE COURT: Now, Mr. Foster, I don't think there is any necessity of going into it. You know there is none posted and there is no use in cross examining the witness on that subject. Both the clerk and Col. Ferrill have testified that there weren't any such, and it is immaterial to me whether he saw it or didn't see it because there wasn't anything there."

[*Uffelman* Record, page 45]

Also, see *Chernekoff vs. United States,* 219 F. 2d 721, 722, 724.

Under the law, during all the period of appellant's selective service processing, it was essential to due process that the local board post the names and addresses of Advisors to Registrants.

At all times concerned, 32 C.F.R. §1604.41 read as follows:

"ADVISORS TO REGISTRANTS

1604.41 APPOINTMENT AND DUTIES.—

"Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms

> and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

On January 31, 1955 E.O. No. 10594 changed §1604.41 of the Selective Service Regulations by making the appointment of Advisor permissive instead of mandatory. The change of one word in the regulation "shall" to "may" indicates a prescient anticipation of this Court's February 24, 1955 *Chernekoff* opinion; the briefs were in, oral argument had been heard and the handwriting was on the wall.

A trial court (the later of the two decisions that have been reported) has reached the same conclusion as did this Court in *Chernekoff:*

> "At no time does it appear that he was apprised of his right to consult with a Selective Service advisor as provided for in the regulations, nor did he see any notice posted in the premises occupied by the board informing him of such right, nor was any such notice called to his attention. None of this testimony was controverted by the Government."

United States vs. Giessel, 129 F. Supp. 223.
But see the earlier one: *Dorn vs. United States,* 121 F. Supp. 171.

This type of failure on the part of a local board is of such a serious nature that it alone is a denial of due process and no administrative appellate procedure can cure the defect. This Court has so indicated in *Chernekoff,* supra, page 724, citing *Franks vs. United States,* 9 Cir., 1954, 216 F. 2d 266.

Deprivation of such an important procedural opportunity should be considered a jurisdictional matter much as deprivation of notice of classification with its concurrent notices of rights to a personal hearing and to an appeal. It is more than a mere clerical error. Since the scope of review is selective service prosecutions is so limited, procedural due process should be strictly adhered to. In fact, the rule is stated in *N.L.R.B. vs. Cherry Cotton Mills,* 5th Cir., 98 F. 2d 444, 446, as well as in many other cases, that where the scope of review is very narrow and restricted then the need for an insistence on strict compliance with the procedural regulations must be followed. It is so even in draft cases. (See *Ver Mehren vs. Sirmyer,* 8th Cir., 36 F. 2d 876, 881, and *United States vs. Zieber,* 3rd Cir., 161 F. 2d 90, 92.)

It must be recalled that under the selective service law it is unnecessary to allow the defendant to have counsel before the board. He has no right of counsel and cannot insist on a lawyer being present. See *United States vs. Pitt,* 3rd Cir., 1944, 144 F. 2d 169; *Niznik vs. United States,* 6th Cir., 1949, 173 F. 2d 328. Since the registrant does not have a lawyer when he appears before the local board for his hearing, this of

necessity means that he must have some sort of advice. The only way that he can get advice is for him to get it from the Advisor. While posting is constructive notice, the failure to give it is no less a violation of procedural due process than is the failure to give actual notice when actual notice is required by the regulations. When actual notice is required, failure to give it is fatal.—See *United States vs. Fry,* 2d Cir., 1953, 203 F. 2d 638; *United States vs. Stiles,* 3rd Cir., 1948, 169 F. 2d 455.

Nevertheless, if a showing of prejurice is required, this appellant's record shows that he was grievously wronged by the board's dereliction. It is undisputable that he never received either a hearing before the local board or an appellate determination, although he made a written request. [Ex 36] This request, as argued hereinabove, should have resulted in the desired opportunity. Assuming here, *arguendo* that the local board was justified in ignoring his plea because it was tardy, we are confronted with another situation: the Selective Service Regulations authorize both the Director and the State Director to perfect an appeal for such a registrant:

> "1626.1 Appeal by Director and State Director.—(a) Either the Director of Selective Service or the State Director of Selective Service as to local boards in his state may appeal from any determination of a local board.
>
> "(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time."

It is thus evident that appellant had an avenue of relief open but that a fog of ignorance prevented him from taking it. At this juncture an Advisor would fulfill the function intended of him. An Advisor could have aided him and could have informed him that both the Director and the California State Director frequently intervene for registrants. In fact, it would have been the Advisor's duty to have placed the matter squarely before one or both of the directors. This Court has doubtless seen instances in the selective service files where appeals have been taken by officials to even the Presidential Appeal Board despite the fact that the letter of the law countenances such an appeal by a registrant only when the State Appeal Board renders a split decision. Appellant, therefore, has been deprived of very important administrative rights by the failure to post the names.

This phase of the subject has been considered in an unreported decision by Judge Peirson Hall in *United States vs. Kariakin,* No. 23223, S. D. California, January 12, 1954:

> "MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.
>
> THE COURT: Very well.
>
> I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.
>
> MR. TIETZ: Yes, sir.
>
> THE COURT: I do not know that it could be so classified as a defective notice because I do not

know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, andl his bond is exonerated.

MR. TIETZ: Thank you."

It is submitted that the failure to post the names and addresses of Advisors to Registrants, as required by the regulations, requires a reversal of the judgment of conviction.

III.

APPELLANT WAS DENIED DUE PROCESS ON AND AFTER DECEMBER 6, 1951 WHEN THE LOCAL BOARD REFUSED TO REOPEN, OR TO EVEN CONSIDER REOPENING, HIS CLASSIFICATION.

Appellant believes he established at least a *prima facie* case with his initial evidence. Nevertheless, after he was placed in the conscientious objector classification in November 1951 he was able to present further and up-to-date evidence of his ministerial status, and of a type not heretofore considered.

In addition to his self-serving letter of December 6, 1951 [Ex 36] he then and subsequently sent documents to show he was currently acting as a minister, documents of a nature not previously filed with the board. [Ex 37, 38, 40, 41] They indisputably showed that he was publicly preaching. These exhibit pages bear no date stamp date of the local board but the printed dates thereon show they cover the period of December 2 to February 15, 1952. Also, exhibits 37 and 41 make clear he was not preaching as a student but as a minister. This new evidence is of importance when viewed in conjunction with the evidence on page 44 of the Exhibit, given to the army induction station by the local board on July 18, 1952.* There, the

*Note the first printed line on the form:
"Section 1-General (Local Board will prepare from latest information available.") [Ex 44]

board informed the army inducting officers that its registrant was "Unemployed except when necessary or convenient; then only for relatives. Holds no full or part-time job."

It is thus clear that not only was there no basis in fact for originally denying him the IV-D classification but that the board erred in not reopening his classification after December 6, 1951, when he presented new evidence, not before considered, of his IV-D status. There is nothing in the file, up to at least July 18, 1952 to rebut his evidence; on the contrary, the board itself admits that he had no other regular work.

However, it is not necessary that this Court find either that appellant should have been classified as a minister or that there was no basis in fact for the denial of the ministerial claim. The Court should find that he was entitled to have his case considered by the local board for the purpose of determining whether the case should be reopened; that §1625.2 required such consideration and that §1625.4 required that he be notified of its consideration and refusal to reopen. Also, he should have had an administrative review. When the local board ignored his request for review and ignored his new evidence for reopening, it committed two wrongs and in each deprived him of his right to an administrative review.

This argument is supported by the holding in *Hull vs. Stalter,* 1945, 151 F. 2d 633, where it was said that a non-exempt lawyer could run for election as a judge, get elected, and be entitled to exemption by his change

in status. In such a situation the board must have some real, substantial reason or evidence why it does not exercise its discretion and reopen the classification. Here the same situation existed.

In other cases it has been held that even the late filing of a special form for conscientious objector has been basis for a request for a reopening.—*United States vs. Clark,* W.D. Pa., 1952, 105 F. Supp. 613. Also see *United States vs. Crawford,* N.D. Calif. 1954, 119 F. Supp. 729.

This case is similar to that of *United States vs. Nimori,* No. 33680, N.D. Calif. S.D. (September 25, 1953). In that case a judgment of acquittal was rendered by Judge Roche. Among other things, he said:

> "Thereupon, after due consideration the Court finds that the defendant was classified in I-A in December of 1948; that thereafter defendant presented facts and information not considered when defendant was originally classified and which, if true, would justify a change in defendant's classification; that the local board's refusal to reopen said classification and grant defendant the right to a personal appearance or appeal was an abuse of discretion and was in violation of Section 1625.2 and Section 1625.4 of the Selective Service Act and Regulations and the procedural rights of defendant guaranteed under the Selective Service Act and Regulations have been denied him, and therefore the defendant is not guilty as charged."

Another case is that of *United States vs. Nichols*, No. 22951-HW, S.D. Cal. C.D. (December 14, 1953). In that case when the defendant registered he did not say that he was a minister of religion. He was then classified by the local board. Thereafter he filed a timely notice of appeal. He was classified I-A by the appeal board. When the case was returned to the local board Nichols submitted new evidence showing that he was a minister of religion. He requested the local board to reopen and consider his case anew. The court held in that case that there was a violation of Section 1625 of the regulations by the local board when it refused to reopen and reconsider the claim for classification as a minister of religion. In that case the court said, among other things:

> ". . . There now appears in Defendant's selective service file considerable evidence in support of his claim that he is a minister. The local board possibly could have found the presented evidence would not justify a change in classification, and, consequently, it could have refused to reopen. However, if the local board determines that the new facts would not justify a change in classification and refuses to reopen, the regulations provide:
>
> " 'In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file.' "
>
> [No such letter, or any notice whatsoever, was sent appellant Frank. The file is bare.]

"We are not now attempting to pass upon the validity of defendant's claim that he is entitled to a ministerial classification. He did, however, make that claim to his local board. The local board by refusing to reopen the case took away from registrant the right to have the matter passed upon by the appeal board. We do not believe it was the intent of Congress to place with the local boards the arbitrary right to determine when a registrant should be entitled to an appeal. The local board might very well disagree with the registrant's contention, but local boards should be vigilant at all times to see that registrants have a right to test their opinions upon appeal. It seems to the court that the action of the local board in this case was arbitrary, as it took away from registrant the right to present to the appeal board his claim that he was a minister."

Another case is *Berman vs. Craig,* 3rd Cir., 207 F. 2d 888. In that case the registrant notified the board that he had become a full-time theological student after he was classified. The court held that the local board was required to reopen and reconsider the classification of the registrant.—See 207 F. 2d, at pages 890-891.

Another more recent opinion has been rendered in the case of *United States vs. Lacasse,* No. 23222-PH, on the docket of the United States District Court for the Southern District of California, Central Division. The motion for judgment of acquittal was sustained by the court on January 13, 1954. Among other things, the judge said:

"The only means under the law by which this registrant could get before the Appeal Board the same thing that was before the Department of Justice and the same thing that was before his local board after these letters were filed with the local board was by a reopening.

"He could not under the regulations appeal from merely a review, but had the draft board reopened his case and again classified him as I-A he then would have had the right of appeal so that the Appeal Board would have had an opportunity to have before them the same thing which was before the Department of Justice when they recommended that he be classified as a conscientious objector.

"I am satisfied that under the Nichols case that it was the duty of the draft board under that state of facts to have reopened the case so as to have permitted him—maybe they would have reached the same conclusion that the Department of Justice did, the Appeal Board to the contrary notwithstanding—but had they reached the same conclusion they previously did it would have afforded this registrant an opportunity to get before the Appeal Board the things which were not before them on the previous hearing.

"For that reason I think that the action of the local board was arbitrary and that there has been no commission of an offense and the defendant is acquitted."

The latest cases dealing with reopening and with the equally important matter of *considering* new evi-

dence for the purpose of reopening, are in accord with appellant's position.

In *Olvera vs. United States,* 5th Cir., June 17, 1955, 223 F. 2d 880, the court distinguished *Witmer vs. United States,* 75 S. Ct. 392:

> "For another reason, this case is distinguishable from Witmer's case, in which the Court held that where in reality the local board *does* hear and consider the new contention but declines to make the formal entry of a 'reopening' and 'reclassification' while notifying the registrant that his I-A classification would be continued, and 'no prejudice is claimed,' there was no denial of a substantial right of the registrant. In the Witmer case, the action of the local board was reviewed by the appeal board to which the file was sent. Here the failure to rule formally on the request to reopen and reclassify denied Olvera of his right to an appeal from this adverse action. In fact Olvera was not even notified of his retention in Class I-A except that the local board 'processed him for induction.' " [883]

cf. *United States vs. Henderson,* 7 Cir., June 9, 1955, 222 F. 2d 421.

Also see:

United States vs. Ransom, 7 Cir., June 16, 1955, 223, F. 2d 15.

The refusal to reopen appellant's classification was a denial of due process; the refusal to consider to re-

open was itself a denial of due process, each requiring a reversal.

IV.

THE GOVERNMENT HAS WHOLLY FAILED TO PROVE A VIOLATION OF THE ACT AND REGULATIONS AS CHARGED IN THE INDICTMENT.

This argument deals only with the first count in the indictment and with that part of the verdict and the judgment based thereon.

The evidence necessary to sustain this count is lacking. The file shows that appellant was first ordered to report on February 23, 1954, and directly to the Los Angeles Department of Charities [Ex. 130]; that subsequently he was ordered to report on June 11, 1954 to the office of the local board for instructions to proceed to the place of employment. [Ex. 148]

It is appellant's position that his offense, if any, is singular, not plural and that the first "delinquency" was waived and cured by the subsequent administrative action. Whether the administrative agency may, by plural orders, multiply the criminal jeopardy of its registrant is not involved here although such action may be morally and legally improper. Involved here is a simple substitution of one administrative order for another.

There is no doubt concerning the intent of the Selective Service System to give appellant an order

to do this particular civilian work; or concerning the intent of appellant to do no work that interfered with his ministerial commitment.

The conduct of each was at all times, consistent with the intent of the party. One set of circumstances, not multiple ones, was contemplated and was carried out. The two sets of circumstances set forth in the two counts of the indictment were as identical as the agency could make them and the second was unquestionably intended as a duplicate substitution for the first; the second order was issued *only* because the agency considered the first one void.

The chief evidence on the subject is the letter of advice from the General Counsel of the Selective Service System to the State Director. The letter concludes:

> "In view of this procedural error it is not possible to recommend prosecution at this time. The cover sheet is returned so that the local board may issue another Order to Report for Civilian Work." [Ex 143]

It is crystal clear from this letter and from the subsequent correspondence and acts of the parties that each considered the second trip to Los Angeles *solely* as a substitute for the first.

It must be concluded that the first trip was considered a technical nullity and that the second was ordered solely to cure the defect. A judgment of conviction based upon the first count was not only something not contemplated, but something directly con-

trary to the waiver intent of the Selective Service System.

Appellant therefore submits that the Court should at least reverse that part of the judgment based on the first count in the indictment.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,
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